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No. 06-1082

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

—v.—

DAVID LEE MOORE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan, non-profit organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has participated in numerous Fourth Amendment cases before this Court including, of particular note here, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), and *Knowles v. Iowa*, 525 U.S. 113 (1998). The ACLU of Virginia is a statewide affiliate of the national ACLU.

STATEMENT OF THE CASE

The Virginia state officers involved in this case concededly violated state law and aggressively exploited constitutional law exceptions designed for exigencies in circumstances where there was no exigency, all in a transparent attempt to avoid the Fourth Amendment's requirement that they obtain a warrant before searching respondent David Lee Moore and his hotel room.

The initial stop of Moore, according to the officers involved, was due to a mistake. Officers Anthony and McAndrew were discussing the fact

[1] Both parties have lodged blanket letters of consent with the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

that a man nicknamed "Chubs" was driving a car in their area. Although this fact did not seem remarkable in itself, Detective Karpowski, who overheard their conversation on his police radio, was aware that a man nicknamed "Chubs," one Christopher Delbridge, had recently been released from a federal penitentiary and had been driving on a suspended license. (Karpowski said he had learned this because he had stopped Delbridge the week before.) Karpowski radioed the other officers and told them that "Chubs" was driving with a suspended license and that they should stop his vehicle.

The officers stopped the car in question, which was actually being driven by David Lee Moore, not the individual known to Detective Karpowski. Amazingly enough, Moore, who evidently was also nicknamed "Chubs," was also driving on a suspended license.

At this point, Virginia law required the officers to do no more than give Moore a summons for committing a misdemeanor and then release him.[2] The only exceptions to this rule provided by the

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[2] "Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence . . . the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody." Va. Code § 19.2-74(A)(1).

Virginia Code, under which an arrest would have been permitted, did not apply in this case.[3]

Despite the clear command of Virginia law, the officers placed Moore under arrest for committing the misdemeanor of driving with a suspended license, handcuffed him, and advised him of his *Miranda* rights. Their reason for arresting him, and the reason for their initial interest in his presence in the area, quickly became apparent. Officer Anthony asked Moore whether he had any narcotics on his person and where he was staying. When Moore replied that he was staying at an Econo-Lodge in Chesapeake, he was taken to Officer McAndrew's vehicle where he was asked to sign a consent form allowing the officers to search his hotel room without a warrant. He signed the form. He was then placed in the police car, but was not searched. The officers later explained this as another mistake – Officer McAndrew said he was under the impression that Moore had already been searched. The officers then called animal control to pick up the dog in Moore's car and, after waiting forty-five minutes for their arrival, drove Moore to his hotel room so they could conduct their search. There, Officer McAndrew somehow realized that Moore had not yet been searched. The officers performed a protective sweep of the room and a search of Moore's person, finding 16 grams of crack cocaine and $516.

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[3] Section 19.2-74(A)(1) allows warrantless arrests for Class 1 and Class 2 misdemeanors only if the person fails or refuses to discontinue the unlawful act, or is believed to be likely to disregard a summons or to cause harm to himself or any other person.

Officer Anthony testified that Moore was not released immediately because "we were still in the middle of an investigation; the investigation was not complete yet. We were, pursuant to the traffic stop, . . . also conducting a narcotics investigation." *Moore v. Commonwealth*, 47 Va. App. 55, 60, 622 S.E.2d 253, 256 (2005) (*en banc*). These facts do not describe a search incident to arrest, but an arrest incident to the desire to search both Moore and his hotel room. Virginia law clearly required the officers to obtain a search warrant before doing so.

The trial court denied Moore's motion to suppress the cocaine and he was convicted of a drug offense. On appeal, a divided Court of Appeals voted to reverse the conviction, 45 Va. App. 146, 609 S.E.2d 74 (2005). On rehearing *en banc*, a divided Court of Appeals affirmed the conviction. 47 Va. App. 55, 622 S.E.2d 253 (2005). The Virginia Supreme Court then held unanimously, seven votes to none, that the evidence should have been suppressed as unconstitutionally obtained. 272 Va. 717, 636 S.E.2d 395 (2006).

SUMMARY OF ARGUMENT

An arrest for an offense Virginia state law declares not to be arrestable is an unreasonable seizure within the meaning of the Fourth Amendment. The Court has often looked to a state's law of arrest in Fourth Amendment decisions, and has never held that state law defining arrestable offenses may be ignored.

Looking to state law as a baseline to decide whether an arrest is reasonable under the Fourth

Amendment is, moreover, consistent with the approach the Court has taken in interpreting many other constitutional guarantees. For example, in the procedural due process area, the Court looks to state law as a primary source of entitlements. If the Court concludes that state law has created an entitlement, it then employs the Due Process Clause to decide, as a matter of federal constitutional law, what protections should attach to that entitlement. *See Board of Regents v. Roth*, 408 U.S. 564 (1972). The same two-step analysis, starting with a policy decision made by state law and ending by putting the procedural consequences of that decision beyond the state's reach, also applies to Fifth Amendment Double Jeopardy and Takings claims, Sixth Amendment claims about the scope of the right to counsel and right to jury trial, Due Process claims regarding the liberty of prisoners, and even the First Amendment's public forum doctrine.

The Court has already decided that the Fourth Amendment allows a state to authorize arrest for even minor offenses. *See Atwater, supra.* But when, as here, a state has made the opposite choice, the Fourth Amendment should be construed to enforce that policy choice by declaring the arrest constitutionally unreasonable. Otherwise, the police have in effect been given a constitutional *carte blanche* to engage in lawless, arbitrary, and discriminatory arrests.

Probable cause is a necessary ingredient of a constitutional arrest under the Fourth Amendment but it is not a sufficient safeguard when the state itself has concluded that arrest is an excessive response to particular offenses. Nor does the

Virginia Constitution provide an adequate safeguard in this case since its relevant provisions have been deemed co-extensive with the Fourth Amendment.

The Court is not being asked to impose a limitation on Virginia's officers that Virginia would find objectionable. To the contrary, the Court is merely being asked to help Virginia enforce the constitutional consequences of its own policy decisions.

ARGUMENT

I. A SEARCH INCIDENT TO AN ARREST THAT IS UNLAWFUL UNDER APPLICABLE STATE LAW IS NOT A REASONABLE SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT

A. A State's Law Of Arrest Provides A Baseline For Determining When An Arrest Is Reasonable Within The Meaning Of The Fourth Amendment.

The idea that a state's law of arrest provides a baseline for Fourth Amendment interpretation is not new. The Court has often stated that the question of whether a search incident to arrest is constitutional can only be answered by looking to the particular requirements of state law.

> The Government contends, however, that this search without warrant must be held valid because incident to an arrest. This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without warrant, it

> could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty.
>
> Note 5: This is the Washington law. State law determines the validity of arrests without warrant. *United States v. Di Re*, 332 U.S. 581.

Johnson v. United States, 333 U.S. 10, 15 & n. 5 (1948)(citations omitted).

In *Ker v. California*, 374 U.S. 23 (1963), the Court confronted the question of whether a state officer's warrantless search of Ker's apartment was justifiable under the Fourth Amendment as a search incident to a "lawful arrest." To answer this question, the Court first determined that probable cause existed, and then looked to state law to flesh out the definition of what constituted a reasonable arrest:

> This Court, in cases under the Fourth Amendment, has long recognized that the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution. *Miller v. United States*, [357 U.S. 301 (1958)]; *United States v. Di Re*, 332 U.S. 581 (1948); *Johnson v. United States*, 333 U.S. 10, 15, n. 5 (1948). A fortiori, the lawfulness of these arrests by state officers for state offenses is to be determined by California law.

Ker, 374 U.S. at 37.[4]

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[4] *Ker* assumed that federal arrests would also be judged by the standards of state law because in *United States v. Di Re*, 332

The Court explained its focus on state law by observing that *Mapp v. Ohio*, 367 U.S. 643 (1961), had not

> precluded [the states] from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See *Jones v. United States*, 362 U.S. 257 (1960). Such a standard implies no derogation of uniformity in applying federal constitutional guarantees

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U.S. 581, 588-95 (1948), the Court had asked whether the arrest in that case, by a state officer for a federal offense, was consistent with the law of the state. "[I]n absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." *Id.* at 589. Deciding that an arrest for a federal offense is invalid because it violates the law of the state where it took place would indeed create a problem of lack of uniformity. That aspect of *Di Re* has become outdated. Congress has nationalized the law of arrest for federal officers. No such non-uniformity problem exists in applying the law of each state only to its own officers.

The *Di Re* Court also noted that the tradition of deferring to state laws governing arrest was one of long standing: "By one of the earliest acts of Congress [Act of September 24, 1789 (Ch. 20, § 33, 1 Stat. 91), the principle of which is still retained, the arrest by judicial process for a federal offense must be 'agreeably to the usual mode of process against offenders in such state.'" 332 U.S. at 589.

> but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques.

Ker, 374 U.S. at 34.[5] The Court went on to hold that the arrest in that case was consistent with both state and federal law.

Similarly, in *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) the Court held that no exigent circumstances existed to excuse obtaining a warrant before conducting a home arrest for an offense defined by state law as minor:

> The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. See Wis. Stat. § 346.65(2) (1975); § 346.65(2)(a) (Supp. 1983-1984). . . . This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest.

See also Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 187 (2004) (arrest for refusal to provide name did not violate the Fourth Amendment because the source of the obligation was state law).

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[5] Justice Brennan, in dissent, argued that the method of entry in *Ker* should have been considered unreasonable under the Fourth Amendment even if it was permissible under state law, a position the Court ultimately adopted in *Wilson v. Arkansas*, 514 U.S. 927 (1995). *Ker*, 374 U.S. at 46-62. Brennan also questioned the plurality's conclusion that state law had not actually been violated, *id.* at 62-63. But he did not disagree that the state law should provide at least a floor for protection against unreasonable arrests.

In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Court considered whether to interpret the Fourth Amendment itself as rendering arrests for minor offenses unreasonable. The Court decided not to get into the business of formulating nationalized limitations to govern local law enforcement. *Id.* at 347. The Court did express concern that the arrest of Gail Atwater, a law-abiding citizen whose only offense was a failure to use seat belts, seemed unnecessary and rather arbitrary, *id.* at 346 ("[i]f we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail"), but concluded that it was best to allow the states to structure their own laws of arrest to preclude custodial arrest for minor offenses if they wished to do so, *id.* at 351-53.

The Texas law at issue in *Atwater* clearly authorized arrest for all violations of the traffic code. *Id.* at 323. The Virginia legislature just as clearly did not. The Court in this case is not being asked to override a decision resting in local policy considerations and conditions, but to respect the state's own choice.[6]

Petitioner and the United States both cite dicta from some cases remarking that probable cause is sufficient to make an arrest reasonable, *see* Petitioner's Brief at 14-15, United States Brief at 7-9.

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[6] The ACLU argued in *Atwater* that the Fourth Amendment itself bars arrest for minor offenses regardless of what state law may authorize. *See* Brief *Amicus Curiae* of the ACLU, *et. al.*, Supporting Petitioner in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2000)(No. 99-1408). We continue to believe that *Atwater* was wrongly decided, although we are not pressing that argument here.

In no case they cite did the Court conclude that an arrest was constitutionally valid despite being invalid under state law.[7]

Fourth Amendment law will never yield consistent results throughout the states because, at an absolute minimum, the Fourth Amendment requires that an arrest be based on probable cause to believe that an offense has been or is being committed. *See Maryland v. Pringle*, 540 U.S. 366, 370 (2003). State legislatures decide how to define offenses; federal constitutional law then superimposes the probable cause requirement as one aspect of what is necessary to render an arrest "reasonable."

This reliance on state law has not posed any problems. Because officers in each state refer to their own unique state law in deciding when an arrest is permissible, there is no likelihood of confusion. Similarly, reviewing courts have not had any difficulty looking to state law to determine whether probable cause existed to believe that a

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[7] In *Cooper v. California*, 386 U.S. 58, 61 (1967) and in *Elkins v. United States*, 364 U.S. 206, 223-24 (1960), the Court held that an otherwise unconstitutional arrest did not become constitutional because a state law purported to authorize it. Although a state may add to the Fourth Amendment requirements, it obviously cannot reduce those requirements. In *Whren v. United States*, 517 U.S. 806 (1996), the question was whether a traffic stop the D.C. Code defined as permissible became unconstitutional because the officer conducting the stop was not wearing a uniform. *Id.* at 815. The D.C. Code had not declared that stops or even arrests for such traffic offenses were unreasonable; it only sought to regulate the relative jurisdiction of plainclothes officers.

state offense was actually being committed. *See, e.g., Devenpeck v. Alford*, 543 U.S. 146 (2004) (providing an example of how careful review of state law is necessary to determine the validity of an arrest).

The Fourth Amendment does not permit officers to disregard the elements of a criminal offense as defined by their own state laws when making an arrest. If an officer does arrest someone without having probable cause to believe that an actual offense was committed, the appropriate sanction (including the exclusion of evidence) is determined under the federal Constitution. There is no reason why the result should be any different when officers disregard their state law on the related issue of whether an arrest for the defined offense is authorized. [8]

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[8] Petitioner's parade of horribles raises the specter of federal courts suppressing evidence because an officer has failed to follow a technical state law requiring the wearing of a badge or imposing a geographical limitation on jurisdiction. Petitioner's brief at 40-43. The discussion of *Whren, supra*, suggests that the Court will have no difficulty in finding arrests reasonable where state law regulates what an arresting officer should wear, as opposed to embodying a fundamental decision about whether or not any given offense is arrestable. The chief case petitioner cites as an example of the federal courts' alleged inability to distinguish between trivial and non-trivial state laws, *Sandin v. Conner*, 515 U.S. 472 (1995), is actually an example of the Court distinguishing the "atypical and significant" deprivations of liberty a prisoner experiences from de minimis deprivations.

B. Relying On State Law To Determine When An Arrest Is Reasonable Is Consistent With The Interpretation of Many Other Bill Of Rights Guarantees.

There is nothing unique or surprising about recognizing that the reasonableness of an arrest under the Fourth Amendment turns in part on state law. To the contrary, the scope of many of the procedural protections provided by the Bill of Rights varies from state to state depending on the unique context of each state's law. It is consistent with interpretations of rights under the First, Fifth, Sixth, and Fourteenth Amendments to treat state law as providing a baseline for determining when an arrest is reasonable, and then to treat federal law as determining the procedural consequences of each state's choice.

The classic example of this two-step interpretive approach is procedural due process doctrine. In *Board of Regents v. Roth*, 408 U.S. at 576-78, the Court explained that plaintiff Roth had no right to a hearing or any other form of due process in connection with losing his job at a state university unless he was deprived of liberty or property within the meaning of the Due Process Clause. The Court held that the first step to take in answering that question was to look at state law. If state law limited the state's discretion to fire Roth, Roth would be deprived of a state-created entitlement by that decision and hence would fall within the ambit of the Due Process Clause. What process he was due would then be decided as a matter of federal constitutional law. *See Cleveland Bd. of Educ. v.*

Loudermill, 470 U.S. 532, 538-41 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Justices Brennan and Marshall had argued that the Court should shoulder the burden of deciding what values the Due Process Clause protects, and should therefore require that any state decision inflicting a "grievous loss" on an individual be tested against federal procedural norms of due process. *See Roth*, 408 U.S. at 587-92 (Marshall, J., dissenting); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (Brennan, J.). Other Justices had advocated a due process balancing test that also would have involved the Court in judicial decision-making about the values due process should protect. *See, e.g., Joint Anti-Fascist Refugee Committee v. McGrath*, 341 US 123, 161-63 (1951) (Frankfurter, J., concurring).

The *Roth* Court rejected those approaches. But it also rejected the idea that the states should be left to decide what process is necessary to protect those rights the state itself has acknowledged. Then-Justice Rehnquist, for example, maintained that state legislatures should retain the prerogative to decide for themselves what sort of procedure should attach to any particular decision because the states may choose whether to create an entitlement in the first place. *Arnett* v. *Kennedy*, 416 U.S. 134, 151-55 (1974). Instead of adopting the Rehnquist "bitter with the sweet" theory, the Court adopted a hybrid rights approach, splitting the decisions about how rights are created and protected. Once state policy makers have made the threshold decision that an entitlement deserves respect, the Due Process Clause then requires the state to follow through on its own normative judgments by providing procedures

sufficient to meet the standards set by federal constitutional law. *Mathews, supra.*

Although this hybrid rights approach is best known in the procedural due process context, the Court has adopted the same technique in many other contexts to decide when constitutional protections apply. The Fifth Amendment's Double Jeopardy Clause, for example, prohibits being put twice in jeopardy for the same "offense," but protection against multiple prosecutions hinges on each legislature's definition of what constitutes an "offense." Under *Blockburger v. United States,* 284 U.S. 299, 304 (1932), two offenses are not the "same" if each is defined as requiring proof of a fact the other does not. It is up to the legislature to decide how to define its offenses. Thus, here too, state law provides the trigger for the constitutional right, but then must yield to the consequences required by the federal constitutional provision being interpreted.

The Fifth Amendment Takings Clause, providing that private "property" may not be taken for public use without just compensation, likewise relies on state law to determine what constitutes "property" entitled to constitutional protection. *See, e.g., Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) ("[b]ecause the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law'"(quoting *Roth*, 408 U.S. at 577); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164-65 (1980) (following the *Roth* approach in deciding that the interest in question was a form of property). *See* Thomas W.

Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 886-88, 934-42 (2000).

Sixth Amendment rights are contingent on state legislative policy decisions, as well. Decisions regarding the temporal and substantive scope of the Sixth Amendment right to counsel also look to state law. The right to counsel attaches once formal judicial proceedings have begun, and the Court has historically treated state law as a minimum baseline in making that decision. The point at which the police must notify counsel of a lineup, *see Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *Moore v. Illinois*, 434 U.S. 220 (1977), or must stop trying to elicit incriminating information in the absence of counsel, *see Massiah v. United States*, 377 U.S. 201 (1964), *Brewer v. Williams*, 430 U.S. 387, 398 (1977), therefore can vary from state to state.[9]

Whether the Sixth Amendment provides a right to assigned counsel also depends on decisions made by the state. Any legislature can choose to avoid the provision of assigned counsel altogether by making a particular offense punishable only by fine, or to create the conditions under which an indigent defendant will be entitled to assigned counsel by

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[9] *Rothgery v. Gillespie County*, 491 F.3d 293 (5th Cir. 2007), *cert. granted*, 07-440 (Dec. 3, 2007), raises the question of whether the Sixth Amendment poses an additional limitation on the state's ability to define when the right to counsel begins. No matter what the Court decides in *Rothgery*, it will still be true that the state law establishes a minimum baseline of protection. Sometimes, as in the Fourth Amendment area, the Court concludes that the state's minimum is not sufficient -- a state may not, for example, decide to create a law of arrest eliminating the probable cause requirement.

providing for punishment by incarceration. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972). The Sixth Amendment right to counsel only requires the state to spend money on provision of defense counsel if the state has chosen to impose a punishment so serious that the provision of counsel is deemed too important to leave to the vagaries of state politics.

Similarly, the Sixth Amendment right to trial by jury springs into being only if the jurisdiction's legislature has decided that the offense in question should be punishable by incarceration of six months or more. *See Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). In all of these contexts, state autonomy is respected, but not to the extent of eviscerating the Constitution's procedural protections.

The Court has also employed this two-step approach in defining the "liberty" entitlements of prisoners and others. *See Meachum v. Fano*, 427 U.S. 215 (1976).[10] Inmates seeking parole in New York, for example, may not have a right to a parole hearing, *see Boothe v. Hammock*, 605 F.2d 661 (2d Cir. 1979), while inmates in Nebraska will (*see Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11-12 (1979). That difference in constitutional protection is entirely due to the fact that New York policy makers have made different

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[10] For a fuller explanation of the theoretical basis for the hybrid rights approach in the procedural due process area, *see* Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U.L. REV. 482, 543-54 (1984).

decisions than Nebraska's, and those decisions shape a prisoner's legitimate expectation of release.[11]

Recognizing that a state's decision about what constitutes an arrestable offense can have Fourth Amendment consequences is consistent with this broader jurisprudence. Justices Brennan and Marshall had argued that defining the scope of the Fourth Amendment should require the Court to identify the norms and values the Amendment serves, *see Smith v. Maryland*, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting); *United States v. Miller*, 425 U.S. 435, 448, 451 (1976) (Brennan. J., dissenting). That task, which the Court disavowed in *Atwater*, is comparable to deciding what constitutes a "grievous loss," the approach Brennan and Marshall had advocated in the due process area. But despite the lessons of the procedural due process cases, petitioner invites the Court to go to the other extreme and simply leave it to the states to decide whether the search incident to arrest doctrine should

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[11] Even in the First Amendment area, the Court has on occasion used a two-stage inquiry to set levels of constitutional protection contingent upon state policymakers' decisions. *See, e.g., Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), where the Court explained that it first looks to see whether or not "by long tradition or by government fiat" a place has become a public forum devoted to assembly and debate. Only after answering that question does the Court decide what type of First Amendment protections to afford speakers in that place. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1805-24 (1987) (discussing whether the public forum doctrine should ideally make constitutional principles rest on social practices or vice versa).

apply to officers who use the arrest power at their own whim, even if in flagrant defiance of state law, or to restrict Fourth Amendment analysis to asking at most the minimal question of whether probable cause existed. Petitioner's Brief at 19. This Court should reject that approach here, just as it did in the procedural due process cases.[12]

Petitioner paints a dire picture of befuddled federal courts grappling with the complexities and confusion of state law, or taking on the role of instructing state officials on the meaning of their own law. Petitioner's Brief at 20. What petitioner describes as a uniquely daunting inquiry, however, is in reality routine in numerous constitutional contexts. Petitioner further assumes that whoever creates a right should also have the final decision about the procedures and remedies surrounding that right. *Id.* at 20-26. That assumption, like the firmly rejected "bitter with the sweet" approach of *Arnett v. Kennedy, supra*, is not an accurate reflection of the Supreme Court's constitutional law in any of the areas of constitutional procedure described above. A state may no more decide to authorize successive trials for two identical offenses it has created than it may truncate due process protections attaching to a state-created entitlement.

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[12] The due process cases reject any notion that the Court should minimize its role in deciding what process is due by, for example, setting aside state procedural decisions only if they are shocking to the conscience. Deciding that an arrest is reasonable simply because it is based on probable cause would limit the scope of the Fourth Amendment in a similarly inappropriate fashion.

In this case, Virginia decided not to confer upon its officers discretionary arrest power constrained only by the probable cause requirement. Virginia's decision to define what happened to David Moore in this case as an unreasonable search and seizure triggers Fourth Amendment protections, just as a state's decision to create an entitlement triggers due process protections.

Respondent makes much of the fact that the Court has previously held that state laws do not always generate expectations of privacy under the Fourth Amendment. Petitioner's Brief at 18. *California v. Greenwood*, 486 U.S. 35 (1988), the principal case on which petitioner relies for this proposition, is readily distinguishable. The state law at issue in *Greenwood* was a state constitutional right of privacy applicable to the general public, not a law circumscribing the authority of state law enforcement officers. The Supreme Court concluded that the California courts did not create a "search" within the meaning of the Fourth Amendment by holding that individuals have a state constitutional right of privacy in their trash. *Id.* at 43-44. The Court has always held that whether or not something is a "search" within the meaning of the Fourth Amendment depends on nationwide "societal expectations," under the *Katz* test. *Katz v. United States*, 389 U.S. 347 (1967). The Virginia statute in this case, by way of contrast, addresses what is already clearly a Fourth Amendment seizure – an arrest – and a Fourth Amendment search of a person and a home. As the cases in the previous section demonstrate, the Court has historically embraced the idea that a determination of when an arrest is

reasonable, reflected in the state law of arrest, is to be treated differently from the question of whether the Fourth Amendment applies at all.

II. ABSENT A STATE LAW LIMITATION, CURRENT FOURTH AMENDMENT LAW CREATES INCENTIVES FOR UNLAWFUL ARRESTS AND UNJUSTIFIED SEARCHES WITHOUT IMPOSING COUNTERVAILING LIMITS

Because current Fourth Amendment doctrine makes custodial arrest the necessary predicate for an automatic warrantless search, *see Knowles v. Iowa*, 525 U.S. 113 (1998) (declaring a search incident to arrest impermissible if a citation is issued), officers are invited to defy their state law of arrest if they wish to conduct a search but have no probable cause to justify that search and no lawful authority to arrest. Beyond reliance on state law, current constitutional doctrine imposes no limitation on an officer's discretion to arrest except for the existence of probable cause to believe that an offense, no matter how trivial, has been committed. The Court has created a number of bright line rules, each initially designed to address an exigency, which in combination have created a vast power to conduct searches without either a warrant or probable cause to search. If the state law of arrest does not provide some limit to that discretion beyond the minimal probable cause for arrest requirement, there will be no meaningful limit.

A. The Search Incident to Arrest Doctrine Invites Warrantless Searches Even Where No Exigency Exists.

Robinson v. California, 414 U.S. 218, 235 (1973), correctly observed that searches incident to arrest are sometimes justified by exigency – either to protect the arresting office or to prevent concealment or destruction of evidence. Responding to the need to conduct a warrantless search in some cases, the Court conferred a broad power to search incident to arrest in all cases, even in circumstances where there is little likelihood of danger and no likelihood that evidence will be concealed or destroyed. *Robinson* ruled that authority to search an arrestee's person can be exercised even where an offense, like a traffic offense, does not generate any prospect that evidence might exist. *New York v. Belton*, 453 U.S. 454 (1981), then expanded the search incident to arrest authority respecting vehicles, affording a broad bright line authority to conduct warrantless searches of vehicles in the absence of probable cause to search, even in circumstances where an individual is in handcuffs and removed from the vicinity of the vehicle and thus poses no danger. *Thornton v. United States*, 541 U.S. 615 (2004), further expanded this automatic search authority to situations where the person arrested was not even in the car at the time of arrest.

It is no wonder that Justice Scalia, in *Thornton*, urged the Court to return to the principle that if officers wish to search the car of a person who has been arrested, in circumstances where no actual exigency exists, they should be required to demonstrate probable cause to believe that evidence

might be found. "The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging," *id.* at 630 (emphasis in original), but "[i]n the context of a general evidence-gathering search, the state interests that might justify any overbreadth are far less compelling." *Id.* at 632.

The search incident to arrest in this case is virtually indistinguishable from general rummaging. Moore committed the traffic offense of driving with a suspended license. His infraction generated no prospect of finding evidence of the crime for which he was arrested, and did not seem to lead the officers, who forgot to search him at the scene of the arrest, to believe that he was dangerous. Moore's commission of this traffic offense could not, under *Knowles, supra*, have led to an incident search if the officers had obeyed their state law and issued a summons. Petitioner argues that *Knowles* is distinguishable because an arrest took place here, despite the fact that the arrest was illegal. Allowing officers to get around *Knowles* so easily would ratify the "prerogative"[13] the officers in this case claimed -- to bootstrap their way into what would have been an overbroad search power in any event. There is no reason to allow officers who conduct illegal arrests to take advantage of their own misconduct by conducting searches that, even if the arrest had been legal, would not have addressed an actual exigency. The cynicism and illegality of the officers' conduct here highlights the need for some meaningful

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[13] See *Moore v. Commonwealth*, 47 Va. App. 55, 60, 622 S.E.2d 253, 256 (Ct. App. 2005) (*en banc*).

implementation of the Fourth Amendment's central purpose of constraining arbitrary or discriminatory arrests and searches.

Just last Term, the Court unanimously decided that a passenger is "seized" within the meaning of the Fourth Amendment when the car in which the passenger is traveling is stopped. *Brendlin v. California*, 127 S. Ct. 2400 (2007). The state conceded that the officers in question had violated state law by stopping the car in which Brendlin was traveling. *Id.* at 2404 n.2. In its opinion, the Court recognized the importance of interpreting the Fourth Amendment in a manner that avoids creating perverse incentives for overly zealous officers, remarking that a contrary rule would invite officers to stop cars illegally. *Id.* at 2410. The same concern applies with equal force here.

B. The Lack Of Either Subjective Or Objective Limitations On The Arrest Power Invites Unreasonable Arrests And Searches.

The Court has already rejected two of three possibilities for limitations on the arrest power, either of which would have had the effect of circumscribing the search incident to arrest authority in circumstances where no exigency exists. In *Whren, supra*, the Court declined to hold that officers act unreasonably if they use enforcement of minor traffic laws as a pretext to conduct a search they could not otherwise have conducted. After rejecting the idea that the Fourth Amendment might impose some subjective limitation on an officer's power to arrest, the Court went on to reject the

imposition of an objective limitation as well. In *Atwater, supra,* the Court ruled that an arrest for a minor, fine-only offense is not inherently unreasonable within the meaning of the Fourth Amendment, freeing officers to conduct arrests in a vast array of circumstances and then conduct warrantless searches incident to arrest.[14]

The combined effect of the unlimited bright line rules the Court has created in this series of cases has substantially diluted core Fourth Amendment safeguards:

> "I[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find." I entirely agree with that assessment.

Thornton, 541 U.S. at 628-29 (Scalia, J., concurring) (quoting *United States v. McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring). The Court has reached this unfortunate position by piling bright line rules on each other without attending to the combined effect of those rules. *See* Donald A. Dripps, *The Fourth Amendment and the Fallacy of*

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[14] The decision in *Atwater* has been criticized as affording too much unconstrained discretion to arrest. *See, e.g.*, 3 Wayne R. LaFave, SEARCH & SEIZURE 5.1 (Supp. 2004); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORD. L. REV. 329 (2002).

Composition: Determinacy versus Legitimacy in a Regime of Bright-Line Rules, 74 MISS. L.J. 341, 392-404 (2004). Dripps describes *Whren*, *Atwater*, and *Belton* as together creating an "iron triangle" where police can arrest and search at whim. *Id.* at 392-404.

The facts here show how easily officers can maneuver within the "iron triangle" and how they can capitalize on a pretextual arrest in order to search not only the person arrested and his vehicle, but even the person's home, by inveigling consent to search -- all without either probable cause to search or a warrant. Petitioner defends the "constitutional propriety" of the illegal arrest and unjustified search in this case, *see* Petitioner's Brief at 10, on the ground that they happen to fall within the iron triangle. As Justice Scalia noted in *Thornton*, 541 U.S. at 627, however, such a search "is not the Government's right; it is an exception – justified by necessity – to a rule that would otherwise render the search unlawful." Justice Scalia, like the unanimous Court in *Brendlin*, *supra*, recognized the continuing truth of an earlier observation by Justice Robert Jackson: "We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (dissenting).

III. RELYING ON STATE LAW TO DEFINE WHEN AN ARREST IS REASONABLE FOR FOURTH AMENDMENT PURPOSES IS NECESSARY TO PREVENT ARBITRARY AND DISCRIMINATORY ARRESTS AND INCIDENT SEARCHES

This case demonstrates how easy it is for an officer to subvert both state law and the warrant requirement in order to rummage for drugs. The expansive search incident to arrest authority has become the modern equivalent of the general warrant, allowing the police to search at will. *See Entick v. Carrington*, 19 How. St. Tr. 1029, 1031, 1063-744 (C.P. 1765) (disapproving a search of plaintiff's private papers under a general warrant, despite the arrest of the plaintiff). This situation surely would have horrified the framers of the Fourth Amendment.

> [The framers] did not perceive the warrantless officer as being capable of posing a significant threat to the security of person or house. That was because the ex officio authority of the peace officer was still meager in 1789. Warrant authority was the potent source of arrest and search authority. As a result, the Framers expected that warrants would be used.

Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552 (1999). "[T]he common law did not provide officers with discretionary search and seizure authority." *Id.* at 619.

A. Encouraging Officers To Ignore Limitations Imposed By Their State Law Of Arrest Invites Arbitrary, Discriminatory, And Ineffective Law Enforcement.

What could be more arbitrary than an arrest prohibited by state law? If the Fourth Amendment endorses any arrest based on probable cause, regardless of the arrest's illegality under state law, officers will have almost boundless discretion to decide whom to arrest and therefore search. The facts in this case demonstrate that some officers will disregard state law in exercising that discretion. The Court in *Brendlin*, *supra*, also confronted officers who were willing to violate state law in order to stop a car, and recognized that it would be a mistake to interpret the Fourth Amendment in a manner that condones or invites such illegal conduct. 127 S.Ct. at 2410.

If officers can arrest and search almost on whim, some officers will inevitably use that authority to conduct arbitrary arrests, or to discriminate on the basis of race or some other impermissible factor. There are, unfortunately, many cases showcasing officers who were willing to take advantage of this license to perform what seem to have been arbitrary and possibly discriminatory arrests. *See, e.g., Fisher v. Washington Met. Area Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982) (arrest for eating on the subway); *Thomas v. Florida*, 614 So.2d 468 (Fla. 1993) (arrest for failure to have a bell or gong on one's bicycle); *United States v. Herring*, 35 F. Supp. 2d 1253 (D. Or. 1999) (arrest for littering); *Barnett v.*

United States, 525 A.2d 197 (D.C. Ct. App. 1987) (arrest for "walking as to create a hazard").

The probable cause requirement is a negligible hurdle and an inadequate deterrent to arrests prohibited by state law. Petitioner prominently cites Fourth Amendment authority Wayne LaFave for the proposition that nothing more than probable cause is required for an arrest to be reasonable. Petitioner's Brief at 29. In the section cited, however, LaFave was merely reporting the Court's dicta.[15] Expressing his own view elsewhere, LaFave has forcefully argued that probable cause should not be the only Fourth Amendment requirement for arrest because it does not provide sufficient guidance to officers. "[P]robable cause as to a minor traffic violation can be so easily come by that its existence provides no general assurance against arbitrary police action," Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1854 (2004). *See also id.* at 1852-53. If probable cause is the only prerequisite to arrest, virtually anyone who drives can be stopped (for changing lanes without signaling, exceeding the speed limit, etc.). Pedestrians can be arrested for jaywalking, mass transportation riders for eating or

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[15] The Court has also frequently said that an arrest not complying with the state law of arrest would be invalid. *See Johnson, supra* (noncompliance with presence requirement); *Ker, supra* (noncompliance with knock and arrest requirement). The Court's recent dicta to the opposite effect have not been the basis for holdings, and so the question petitioner describes as resolved is in fact being squarely presented to the Court for the first time.

putting a package on the seat, and cyclists for failing to have a "bell or gong" on their bicycle, all so that officers can rummage for drugs. The cases above describing people who have actually been arrested and even searched for such trivial offenses, *see, e.g.*, . *Thomas v. Florida, supra,* show that probable cause is indeed a very low bar.

The *Atwater* decision declined to raise that bar because the Court thought that arbitrary arrests were unlikely to occur very often. The Court reached that conclusion by speculating that officers would not want to waste resources and time by taking people into custody unnecessarily. *Atwater,* 532 U.S. at 352. These pragmatic considerations do not, however, prevent an officer from conducting an arbitrary arrest in order to search and then simply releasing the individual or issuing a summons if the search comes up empty. Arbitrary custodial arrests, as happened to Gail Atwater, may be rarer than arbitrary or discriminatory searches incident to arrest.

Substantial empirical evidence also strongly suggests that allowing virtually unconstrained police discretion to decide whom to arrest and search may disproportionately affect minorities. In a national survey published in 2006, the United States Department of Justice found that African-Americans were nearly three times as likely and Hispanics more than twice as likely as white motorists to be physically searched or to have their vehicles searched when their cars were stopped.[16] *See also* 1

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[16] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE 2002 5 (2006), available at http://www.ojp.usdoj/bjs/pub/pdf/cdsp02.pdf.

Wayne R. LaFave, SEARCH & SEIZURE 1.4 n. 77.36 (Supp. 2004). *Amici* do not have data showing how extensive a problem this might be within the state of Virginia because the Virginia legislature has repeatedly voted down bills that would have mandated collecting statistics on racial profiling.[17] It is clear, however, that "[f]ishing for drug couriers in the immense stream of cars on interstate highways is a hopeless strategy for eliminating drug trafficking; it probably has no impact whatsoever on drug markets." Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1431 (2002). Furthermore, studies consistently find that there is no difference in "hit rates" – contraband discovery rates – when officers use their discretion to search in a racially disparate manner.[18] Thus, there is little benefit to law enforcement gained by allowing state officers to evade the limitations of their state law of arrest.

B. Virginia's State Constitution Does Not Provide Any Independent Limit On Police Discretion To Arrest.

State constitutional law does not provide an adequate alternative to Fourth Amendment protection. In *California v. Greenwood*, 486 U.S. at

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African Americans were searched during 10.2 % of stops; Hispanics 11.4%, and whites 3.5%.

[17] *See* RACIAL PROFILING DATA COLLECTION RESOURCE CENTER AT NORTHEASTERN UNIVERSITY, http://www.racialprofilinganalysis.neu.edu/background/jurisdictions.php?state=VA (describing the failure of four bills, HB 157 (2006), HB 2735 (2005), SB 225 (2004), and SB 280 (2002)).

[18] *See* BUREAU OF JUSTICE STATISTICS, *supra* note 16, at 6.

43-44, after declining to find a government investigation to be a search within the meaning of the Fourth Amendment, the Court suggested that individual states could use their own constitutions to impose more stringent constraints on their state police. This case provides a striking example of how readily the Fourth Amendment's floor can become its ceiling.[19]

The Virginia Constitution does not contain a provision like the Fourth Amendment, prohibiting unreasonable searches and seizures. The Virginia Constitution only provides: "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted." VIRGINIA CONSTITUTION, article I, § 10. The framers of the Virginia Constitution evidently did not foresee a world in which exceptions to the warrant

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[19] In *Whren*, the Court suggested the possibility of an equal protection challenge to address discriminatory searches or seizures. 517 U.S. at 813. That possibility has turned out to be more theoretical than real. A plaintiff cannot successfully challenge a pattern of discriminatory arrests under the Equal Protection Clause without meeting the very demanding burden of proving intentional racial discrimination. For this reason, equal protection challenges will "almost always fail." David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 326; *see also* LaFave, *The "Routine Traffic Stop,"* 102 MICH. L. REV. at 1860-61. For a dramatic example of how easily a plaintiff's discrimination claim can be dismissed despite substantial evidence of discriminatory enforcement, *see Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001).

requirement would proliferate. They acted against a background where law severely limited warrantless arrest and search authority and so they tried to constrain legislatures from using general warrants to authorize conduct that would not otherwise have been acceptable, on the assumption that the common law would prevent arbitrary warrantless searches and seizures. *See* Davies, *supra,* at 619-24.

Under the duress of this constitutional language and history, the Virginia courts have ruled that state constitutional protections against unreasonable searches and seizures "are substantially the same as those contained in the Fourth Amendment." *Lowe v. Commonwealth*, 230 Va. 346, 348 n.1, 337 S.E.2d 273, 274 (1985)(quoting I A. E. Dick Howard, *Commentaries on the Constitution of Virginia* 182 (1974)). Thus, if the Virginia state legislature provides limitations on arrest but stops short of providing any meaningful enforcement of those limits, the Virginia courts cannot choose to exclude evidence under their state Constitution. The only Constitution that can be brought to bear on what the Virginia Supreme Court obviously viewed as a serious problem is the United States Constitution.

The Virginia state legislature and all of the Justices of the state's highest court agree that the arrest in this case was unreasonable. The Virginia legislature was willing to provide more constraints on the state police than the federal Constitution requires, but stopped short of providing a remedy to make those constraints effectual – just as state law might provide employees with entitlements to their jobs but not to any meaningful procedures to protect

those entitlements. The framers of the Fourth Amendment were concerned that legislatures would authorize general warrants. They would not have been relieved to learn that a legislature might go halfway, imposing a constraint on the ability of peace officers to conduct arbitrary warrantless searches and seizures, but leaving that prohibition toothless.

This Court uses the exclusionary rule, albeit reluctantly, where its use is necessary to enforce constitutional guarantees. *Hudson v. Michigan*, 547 U.S. 586 (2006); *Mapp v. Ohio, supra*. In this case, those guarantees must be derived from state law and must then be enforced by the Fourth Amendment, or there will be no meaningful limits on warrantless arrests or searches in the state of Virginia. All of the members of the Virginia Supreme Court, who are fully familiar with whatever alternative enforcement opportunities exist under Virginia law, believed that the exclusionary rule is necessary in this case. They are right.

CONCLUSION

For the reasons stated above, the judgment of the Virginia Supreme Court should be affirmed.

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